REINSURANCE ROUND-UP
October 2023

In 2023, the disruption caused by the Covid-19 pandemic continues to be the cause of litigation in England, particularly in respect of BI claims and their aggregation, as addressed further below. Appeals are outstanding in several of the cases decided within the previous year.

The war in Ukraine has given rise to coverage issues relating to aviation (re)insurance and, in the US Courts, to cyber risks.

On the regulatory front, reviews are ongoing in preparation for legislative developments to ensure continued appropriate financial regulation following the UK's departure from the EU.

The following is our annual review of some of the cases and legislation over the last year that may be of interest to insurers and reinsurers:

Insurance

- ***Quadra Commodities S.A. v XL Insurance & Ors [2023] EWCA Civ 432:*** The Court of Appeal considered whether a loss had occurred for the purpose of a Marine Cargo Open Policy in circumstances where it transpired that grain, which the policyholder had purchased, had been sold multiple times over. Insurers avoided the claim, arguing that since no grain was physically lost there was no cover. The Court of Appeal was satisfied that grain had been available for inspection and that it did, therefore, exist for the purpose of the policy. The Court rejected insurers' argument that for the grain to be insurable it needed to be identifiable. For a full summary, please see our article at this link.

- ***Finsbury Foods Plc v Axis Corporate Capital Ltd & Ors [2023] EWHC 1559 (Comm):*** This is the first case in which the Commercial Court considered the wording of a Warranty and Indemnity Policy. The policyholder alleged that the seller of a bakery had breached a Price Reduction Warranty and a Trading Conditions Warranty. On the specific facts, the Court found that the circumstances complained of had been known to the buyer, but the Court also provided useful comments on what constitutes '*material adverse changes'.* Please see our article at this link.

- ***Brian Leighton (Garages) Ltd v Allianz Insurance plc [2023] EWCA Civ 8:*** The Claimant, a garage business, made a claim against its Motor Trade Policy when it sustained damages due to a fuel leak. The issue for the Court was whether BI losses suffered due to closure in view of risk of explosions following a fuel leak caused by a sharp object perforating a pipe, was excluded by way of a pollution and contamination exclusion. The Court of Appeal held that the wording 'caused by' indicated that this was only intended to exclude damages where pollution was the proximate cause. Whilst the pollution featured in the chain of causation, the proximate cause of the incident was the puncture to the pipe.

- ***George on High Ltd v Alan Boswell Insurance Brokers Ltd [2023] EWHC 1963 (Comm):*** The case considered the construction of the definition of the insured on the policy. The Claimants *George on High Limited* ("GOH") and *George on Rye Limited* ("GOR") were two commonly owned entities. The former was the owner of the freehold to a hotel called The George; the latter operated the business of the hotel and restaurant. On the insurance contract the insured was named as "*The George on High Ltd t/a The George in Rye".* Following a fire, insurers declined a claim by GOR, saying that this entity was not named on the policy. The Judge concluded that in circumstances where all parties knew the business was operated by GOR, not GOH; the contract listed business interruption and employer's liability as insured risks; and knowing that GOR had paid the premiums for the insurance throughout the period since 2013, a reasonable person would understand the insured to be *"George on High Limited* ***and the business operated by GOR*** *t/a The George in Rye".* In reaching this decision, the Judge had regard to information previously relayed to insurers' claims handlers.

- ***Technip Saudi Arabia Ltd v Mediterranean and Gulf Cooperative Insurance and Reinsurance Company [2023] EWHC 1859 (Comm):*** A vessel chartered by the Claimant collided with a wellhead platform operated by Al-Khafji Joint Operation ("KJO"). The Claimant entered into a settlement agreement in respect of damages sustained as a result and subsequently sought an indemnity from their insurers. Insurers' primary argument on which they succeeded was that KJO was a Principal Assured on the policy, and that cover had, therefore, been excluded. The judgment also considered whether the fact that the policyholder had agreed the settlement without prior approval from the underwriter prevented them from recovering losses. The insurance contract covered "*Ultimate Net Loss which the Insured(s) shall be obligated to pay by reason of … liability…".* Ultimate Net Losses were defined as *"the total sum the Insured is obligated to pay as Damages",* and Damages in turn was defined as "*compensatory damages, monetary judgments, awards, and/or compromise settlements entered with Underwriters' consent".* On this issue, the Court agreed with the policyholder that the term

"compensatory damages" covers the amounts paid in settlement for which the policyholder can prove that it was liable, even if prior consent has not been obtained.

- ***World Challenge Expeditions Ltd v Zurich Insurance Company Ltd [2023] EWHC 1696 (Comm):*** The Claimant, a specialised travel company providing "challenging expeditions" worldwide for school students had taken out travel insurance, including cancellation cover with the Defendant. Due to Covid-19 they were forced to cancel nearly all bookings for 2020, and refund c.£10 million worth of deposits or advance payments paid. Whilst on a proper construction, the cancellation policy only covered third party costs, Zurich's claims handlers had operated the cancellation policy to cover refunds of deposits, albeit subject to a substantial deductible. Then, prior to 2020, Zurich had never made any actual payments in respect of this limb of the policy, but they had recorded claims and set them off against the deductible. Therefore, the insurer had conveyed to the policyholder that they shared their assumption on the scope of the cover, and in reliance on this, the policy holder had not obtained alternative cover. In those circumstances, estoppel prevented the insurer from resiling from this common assumption.

War Exclusions

- ***Merck v ACE & others (Appellate Division of the Superior Court of New Jersey):*** The Claimant was one of a large number of companies affected by malware known at NotPetya which had originated in Ukraine and was widely thought to be attributable to the Russian government. Merck made a claim under an All Risk policy. Insurers invoked the war exclusion. This excluded damages caused *by 'hostile or warlike action in time of peace or war'.* The Appellate Division held that the wording required some form of military involvement and found that the exclusion did not apply to the cyber-attack.

- ***Allianz Insurance Plc v the University of Exeter [2023] EWHC 630 (TCC):*** An unexploded bomb was unearthed at the University of Exeter's premises. This necessitated a detonation on site, as the bomb could not safely be removed. This could not be executed without causing some damages to the adjacent buildings. Notwithstanding some 80 years had passed since the bomb was dropped, the Court held those damages were excluded under the war exclusion. Although the detonation featured in the chain of causation, the presence of the bomb was the proximate cause of the explosion.

Business Interruption (Covid-19)

- ***Stonegate Pub Company v MS Amlin [2022] EWHC 2548 (Comm), Greggs Plc v Zurich Insurance [2022] EWHC 2545 (Comm), and Various Eateries Trading Ltd v Allianz [2022] EWHC 2549 (Comm):*** These three cases were not consolidated, but were heard by the same Judge and judgments were handed down together as they dealt with overlapping issues. Each case considered the same Marsh Resilience MD/B1 v1.1 wording, and the facts of the three matters were broadly similar. The various issues considered included trigger, aggregation and causation. On the issue of aggregation, the Court found that the Supreme Court's finding that each case of Covid-19 was a concurrent proximate cause of the government's actions in response to the pandemic, did not mean each case was a single occurrence, but held there was one 'single occurrence' or a few 'single occurrences' in the government response to the pandemic in the period after 16 March 2020. On causation, the Court held that those cases of Covid-19 which constituted covered events, ended with the first lockdown. Subsequent government actions were in response to a new case. For a full summary, please see our article at this link.

- ***London International Exhibition Centre Plc v Royal & Sun Alliance Insurance Plc & Ors [2023] EWHC 1481 (Comm):*** This is the latest Business Interruption claim to be considered by the Courts in the aftermath of the Covid pandemic. The Commercial Court considered whether the Supreme Court's rejection of the 'but for' test in respect of the FCA Test Case also applies to BI cover under 'At The Premises' ("ATP") policies. By way of recap, the Supreme Court found that each case of Covid-19 across the country was a *'concurrent cause'* of the forced closure. The Judge found the same principle was equally applicable to ATP cases.

- ***Bellini (N/E) Ltd trading as Bellini v Brit UW Limited [2023] EWHC 1545 (Comm):*** The Claimant was the insured under a contract of insurance pursuant to which insurers would indemnify them in respect of *interruption of or interference with the business caused by* ***damage****, as defined in clause 8.1, arising from:* (amongst others) *a) any human infectious or human contagious disease (…) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it.* Damage was defined as '*physical loss, physical damage, physical destruction'.* Under this definition, the Court rejected the Claimants argument that s.8.2.6(a) extended cover in circumstances where there were now physical damages. A reasonable small and medium sized enterprise would be able to read and understand the definition of damages.

Limitation

- ***Rashid and ors v Direct Savings Ltd [2022] 8 WLUK 108***: This is one of a number of cases in which the County Court has considered limitation in respect of claims brought directly against insurers pursuant to the Third Parties (Rights against Insurers) Act 2010. The case illustrates the consistent approach taken by lower Courts considering limitation in the context of the 2010 Act. Contrary to the position prior to this Act, insolvency proceedings do not

suspend limitation. For a full summary, please see our article at this link.

- ***Etroy and RBC Trust Company (Jersey) Limited v Speechly Bircham LLP [2023] EWHC 386 (Ch):*** The Court considered the interpretation of Section 14A of the Limitation Act 1980 which provides a secondary limitation period if facts relevant to a prospective cause of action is not known to the Claimant at the time when limitation expires. When assessing this in the context of claims against professional wrongdoers, the Court will consider if the Claimant ought to have availed themselves of legal advice to trigger constructive knowledge for bringing a claim. For a full summary, please see our article at this link.

Procedural / Jurisdiction

- ***Al Mana Lifestyle Trading LLC & others v United Fidelity Insurance Co PSC & others [2023] EWCA Civ 61***: In this BI case, the Court of Appeal considered the appropriate construction of a jurisdiction clause reading: "*In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued. Otherwise England and Wales UK Jurisdiction shall be applied".* The majority of the Court of Appeal concluded that whilst 'otherwise' might sometimes be interpreted to mean 'or', in the context of a jurisdiction clause, this is to be interpreted as providing a fall-back option, in the event the primary choice of jurisdiction is not available.

- ***Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd:*** Dassault, an aircraft manufacturer, applied for a partial arbitration award to be set aside. The Partial Award declared that the arbitration tribunal had jurisdiction over a claim brought by a Japanese insurer that had subrogated in a claim against Dassault. The Claimant had entered into a sales contract under which it was to supply two aircrafts to the buyer, Mitsui Bussan Aerospace Co Ltd ("M") for redistribution to the Japanese Coast Guard. The contract was subject to English law and contained a provision prohibiting assignment to any third party without the prior consent of the other party. The buyer entered into an insurance contract with the Defendant, which was subject to Japanese law. By operation of Japanese law, the insurer would subrogate into any right of action held by the insured against a third party when making an insurance proceeds payment. The Court found that although assignment was prescribed by Japanese law, the triggering of the relevant provision under the Japanese Insurance Act was a consequence of M's actions. M could have chosen not to take out insurance, taken out an insurance contract not governed by Japanese law, excluded the relevant provision, etc. Therefore, the Claimant's application was allowed.

- ***Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) and others [2023] UKSC 32:*** The case arise out of complex litigation following the so-called "Tuna Bond" scandal in Mozambique in 2013/14. The subject of the appeal, however, is narrowed to the meaning of section 9 of the Arbitration Act 1996 ("the Act"). This provides that a party to an arbitration agreement against whom legal proceedings are brought in respect of a matter which under the agreement is to be referred to arbitration can apply to the Court for a stay of proceedings. The issue for the Supreme Court was whether the Court of Appeal had erred in allowing a stay pursuant to this provision. By way of background, three special purpose vehicles ("SPVs") which were wholly owned by the Republic of Mozambique had entered into three separate supply contracts with various banks ("the Privinvest companies"). The contracts were governed by Swiss law and each contained an arbitration agreement. All the loans were guaranteed by Mozambique under a contract governed by English law. In 2019, Mozambique issued claims in England against the Privinvest companies alleging bribery and various torts of deceit. In response, the Prvinvest companies claimed that although Mozambique was not a signatory to the supply contracts they were, as a matter of Swiss law, party to them and, therefore, subject to the arbitration agreements. Consequently, they applied for a stay of proceedings pursuant to section 9 of the Act. The Supreme Court found that there is now a general international consensus among the leading jurisdictions involved in international arbitration in the common law world on what constitutes *matters* which must be referred to arbitration. The principals are summarised in paragraphs 72-77. Applying those principles, the Supreme Court found the proceedings brought were not covered under the arbitration agreement and allowed the appeal.

Professional Liability

- ***Qatar Investment & Projects Development Holdings Co & His Highness Sheikh Hamad Bin Abdullah Al Thani v John Eskenazi Limited & Mr John Eskenazi [2022] EWHC 3023:*** This matter concerned an antiquity dealer's liability when selling artefacts attributed as 'ancient' which turned out to be forgeries. Whilst the sales description did not amount to a contract, it was common ground that the dealer owed the customer a duty of care to exercise the requisite level of skill and care when forming their opinion. On the facts, as there was a proliferation of fakes in the market, the Judge considered that no reasonable leading specialist antique dealer would have expressed an unqualified opinion that each of the seven objects was ancient. Please find our full article at this link.

- ***Tulip Trading Limited v van der Laan and ors [2023] EWCA Civ 83:*** The Court of Appeal considered whether the first instance Judge had been right to set aside service outside of the jurisdiction on the basis that the Defendants did not owe the Claimant fiduciary duties. The Defendants were the developers of a block-chain network which hosted so-called wallets. The

Claimant was a user of the network, who has lost access to their crypto-assets by way of losing their key in a hack. The Court of Appeal did not conclude whether the Defendants owed the Claimant fiduciary duties in these circumstances, but found that it was arguable that they did. Therefore, the facts should be heard at a full trial. For a full summary, please see our article at this link.

- ***Philipp v Barclays Bank UK plc [2023] UKSC 25:*** The Court of Appeal had previously found that bankers may owe a duty to refrain from executing instructions and carry out investigations if they come on notice that the relevant instructions have been given to them by a principal who is the (potential) victim of fraud. The Supreme Court allowed the banks appeal, holding the banks primary duty is to execute instructions that are unquestionably given by their principal promptly. They are not required to second-guess the customer's decisions. Please see our article at this link.

Regulatory Updates

- ***Insurance Resolution Regime:*** Upon concluding its review of Solvency II, the government is liaising with relevant parties with the intention to introduce an Insurance Resolution Regime ("IRR") when Parliamentary time allows. The objective is to align the UK with international standards and enhance financial stability in the UK by providing the Bank of England as the Resolution Authority ("RA") with new powers and tools to effectively manage the failure of an insurer. In terms of scope, the consultation paper indicates that the IRR is intended to cover UK branches of foreign insurers, niche insurers, and mutual. However, the IRR will not apply to Lloyds, which is subject to special regulation. Proposed IRR stabilisation options include, amongst others, compulsory transfers to private sector purchasers without Court approval; transfer to temporary bridge institutions; and power for the RA to 'bail-in', by restructuring, modifying or writing down liabilities.

- ***FCA Consumer Duty:*** On 31 July, new rules came into force, enhancing the standard of consumer protection in financial services. The key objective is to secure 'good outcomes' for consumers. The rules put an onus on financial service providers to achieve this by securing customers get the support they need; that communication is worded in plain language; and that services and products meet customers' needs at fair value.

- ***White Paper, 'AI regulation: a pro-innovation approach':*** The government published the white paper on 29 March 2023, setting out its vision for the future architecture of AI regulation in the UK. In terms of financial regulation, the government proposes to set up a central monitoring and evaluation section, but leave it to existing financial service regulators to develop necessary AI regulation. For our further comments on the subject, please see our article at this this link.

If you have any questions regarding any of the issues referred to in this Round-Up, please get in touch with us.

You can also review a range of articles on insurance and reinsurance topics in the Publications section of our website.

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